The words "withdraw the whole matter from the court" in my opinion admit of no ambiguity. They mean precisely what it intends to convey.

It is pretty obvious that the plaintiff was quite happy with the transaction, and had signed the agreement the last paragraph of which says in clear form, though not couched in good conveyancing language:

"Mr. Teo Eng Jin has agreed to with draw the whole matter from the court case which is consent of the both party."

Had the plaintiff desired to limit himself to the debt in the summons which he now claims rather than the whole matter — nothing would have been easier than to insert the appropriate words.

However even if there was any ambiguity, the rule of construction is this: It "is a general rule that the words in a deed are to be construed most strongly 'contra proferentem' ". As was stated by Holroyd J. at page 512 in *Edis* v. *Bury*: [4]

"... if there be any ambiguity in the words of this instrument, they ought to be construed favourable for the plaintiff, and against the defendant, who made the instrument."

In the circumstances holding as I do that the plaintiff was the author and draftsman of the agreement I am of opinion that the agreement speaks of the "whole matter" and not of the judgment debtor summons only as was alleged by the plaintiff.

I must here point out that I have observed the plaintiff giving evidence, and that he understands the English language quite well. He has throughout the proceedings answered questions put by counsel even before the court interpreter completed his interpretation. When he was questioned about the cars, he was about to blurt out something. However he thought better of it and checked himself in time probably realising his own interest in the present case may be jeopardised by what he was about to say and merely said he did not receive the keys.

The plaintiff must, as it seems to me elect to take the step he had taken in order to steal a march over the other creditors or in the alternative sue the defendant for the entire sum and accept the risk of a division of the debtor's property amongst his creditors.

The defendant gave his evidence as it seems to me in a straightforward manner and I consider him to be an honest and truthful witness and I accept his evidence.

The evidence leaves no doubt on my mind on the basis of credibility and probabilities of the case that the plaintiff intended to contract on the basis as contended by the defendant.

It was he who dictated the terms of the agreement and I so find.

For one or more or all of the reasons given above the plaintiff's claim is accordingly dismissed with costs.

Claim dismissed.

Solicitors: *Chan, Jugah, Wan Ullok & Co.; Battenberg & Talma.*

JOSEPH v. GOVERNMENT OF SARAWAK & ANOR.

[O.C.J. (Yusoff J.) January 15, 1975]
[Kuching — Civil Suit No. K 264 of 1972]

Administrative Law — Action of tort against Government — Allegation of malicious falsehood against head of department — Whether claim comes within the Public Authorities Protection Ordinance, 1948.

Practice and Procedure — Application to set aside writ as frivolous and vexatious — R.S.C., 1957, O. 25 r. 4.

In this case the plaintiff had been employed as Senior Technical Assistant in the Public Works Department. In 1969 his head of department, the second defendant, purported to transfer him to the Kuching Water Board, stating falsely in a memorandum that the plaintiff had agreed to the transfer. When the plaintiff requested for a copy of the option alleged to be exercised by him the second defendant, purportedly terminated the plaintiff's services with the Board. In an action in the High Court the plaintiff obtained a consent order declaring that he was and had been at all material times a servant of the Government of the Sarawak. Following that suit, the plaintiff instituted this action claiming *inter alia* damages for malicious falsehood. The defendants thereupon applied by motion to strike out the writ of summons and set aside all subsequent proceedings on the ground that the statement of claim disclosed no reasonable cause of action, it was frivolous and vexatious and that the proceedings were an abuse of the process of the court. It was contended that the claim was statute barred by the Public Authorities Protection Ordinance, 1948 as it was not instituted within twelve months of the alleged act, neglect or default.

Held: (1) in this case there was no suggestion that the second defendant had acted in the exercise of his public duty or authority when he wrote the memorandum concerned. The second defendant had not in the circumstances acted in exercise of his public duty or authority so as to entitle him to the protection of the Public Authorities Protection Ordinance, 1948;

(2) the statement of claim in this case raised triable issues and it could not therefore be said that the writ was frivolous or vexatious.

Cases referred to:-

(1) *Government of Malaysia* v. *Lee Hock Ning* [1973] 2 M.L.J. 51.

(2) *McManus* v. *Borves & Ors.* [1938] 1 K.B. 98.

(3) *Compton* v. *West Ham Borough Council* [1939] 1 Ch. 771.

(4) *Bradford Corporation* v. *Myers* [1916] A.C. 242.

(5) *Duchy of Lancaster* v. *London and North Western Railway* [1892] 3 Ch. 274.

(6) *Tio Chee Hing* v. *Tractors Malaysia Bhd.* [1973] 1 M.L.J. 66.

CIVIL SUIT.

T. O. Thomas for the plaintiff.

Denis Ong Jiew Fook (Asst. State Attorney-General) for the respondents.

Yusoff J.: This is a motion taken out by the defendants, the Government of Sarawak and Ng Siak Khee, the Director of Public Works Department, Sarawak, as second defendant to strike out the Writ of Summons and set aside all subsequent proceedings in an action filed against them by the plaintiff for malicious falsehood and declarations of rights, on the grounds that the statement of claim discloses no reasonable cause of action; it is frivolous and vexatious; and that the proceedings are an abuse of the process of the court.

The plaintiff alleged that he was employed by the Government of Sarawak in 1956 as Senior Technical Assistant in the Public Works Department. In 1969 the second defendant purportedly transferred him to the Kuching Water Board without his consent. The memorandum of transfer written by the second defendant dated April 11, 1969 and addressed to Accountant-General, Kuching with copies to State Secretary, Kuching and other officials contained the following words:

"P.J. Joseph joined P.W.D. as a Senior Technical Assistant on 16.7.56 and was seconded to Kuching Water Board since 1.4.61. He has now agreed to be transferred to the Kuching Water Board on the permanent and pensionable establishment as per copy of his written option attached."

It is alleged that the memorandum contained malicious falsehood as second defendant knew that the plaintiff had never been seconded to the Kuching Water Board; nor had he agreed to be transferred to the Board and that there never was any written option exercised by the plaintiff.

It is further alleged that when the plaintiff requested for a copy of the option exercised by him the second defendant purportedly terminated the plaintiff's services with the Board with effect from December 31, 1971. The plaintiff consequently, filed an action Civil Suit No. K.221 of 1971 for determination by the court of the validity of the termination of his services by the defendants; whereby he obtained a consent order declaring that the plaintiff is and has been at all times from July 16, 1956 a servant of the Government of Sarawak. Following that civil suit the present action is instituted by the plaintiff claiming the following remedies: —

"1. A declaration that the plaintiff is and was entitled to be paid salary on the basis that he has been promoted to Division II Scale C4-6 with effect from 1st April 1961.

2. A declaration that the plaintiff is and was at all material times entitled to be offered conversion of salary under Pekeliling Perkhidmatan Bil 9 Tahun 1971 with effect from 1st January 1970 on the basis of his promotion to Division II Scale C4-6 with effect from 1st April 1961.

3. A declaration that the plaintiff is entitled to Regional Allowance under the provisions of paragraph 54 of Pekeliling Perkhidmatan Bil 9 Tahun 1971 with effect from 1st October, 1971.

4. A declaration that the plaintiff is entitled to arrears of salary on the basis that he should have been paid scale C-5 salary of $930/- per month with effect from July 1963.

5. A declaration that the plaintiff's leave credit as at 1.1.72 is 84 days and that he was and is entitled to spend the 84 days' leave in India.

6. A declaration that the plaintiff did not consume 70 days' leave from 23.10.71 to 31.12.71.

7. A declaration that it was impossible for the plaintiff to utilize any leave from 23.10.71 to 31.12.71.

8. Damages for malicious falsehoods, including Special Damages $5,057/-.

9. Arrears of salary.

10. Further or other relief.

11. Cost."

On examination of the Statement of Claim I am inclined to agree with the defendant that the sole basis of the plaintiff's claim is the tort of malicious falsehood which is relied on the substance of the official memorandum dated April 11, 1969. Other remedies sought are consequential and are interrelated with the main claim. Having regard to this, the defendant contends that the claim is statute barred by the Public Authorities Protection Ordinance 1948; the action being filed on October 13, 1972 whereas the alleged malicious falsehood was published on April 11, 1969 — exceeding the period of twelve months allowed by the Ordinance (now amended to three years with effect from June 13, 1974 by Act A.252/74).

The material provision of the Ordinance is section 2 which is as follows: —

"2. Where, after the coming into force of this Ordinance, any suit, action, prosecution or other proceeding is commenced in the Federation against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority the following provisions shall have effect —

(a) the suit, action, prosecution or proceeding shall not lie or be instituted unless it is commenced within twelve months next after the act, neglect or default complained of or, in the case of a continuance of injury or damage, within twelve months next after the ceasing thereof;

(b) whenever in any such suit or action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client."

Many cases have been referred to me on the interpretation of this provision but I have the advantage of reading the recent Privy Council Report on the construction of this very provision in *Government of Malaysia* v. *Lee Hock Ning*.[1] Relying on the interpretation of section 1 of the United Kingdom Public Authorities Protection Act 1893 which had similar language as our Ordinance, their Lordships said at page 51;

"In cases arising out of breach of contract, as in cases arising out of tort, the question is the same ...; is the suit one in respect of neglect (e.g. negligent) or default (e.g. breach of contract) in the execution by the authority of law, duty or authority? The phrase 'execution of duty or authority' is somewhat inelegant, but it is employed, in their Lordships' view, in order to make clear that no distinction is to be made, in classifying the neglect or default, according as it was committed in the exercise of positive duty laid or a permissive power conferred on the authority."

Thus in the present action, the question is whether the memorandum dated April 11, 1969 was written by the second defendant in the execution of a written law, duty or authority? In other words, was the letter constituting the alleged malicious falsehood written by the second defendant in the exercise of a positive duty laid or a permissive power conferred on him?

As noted by their Lordships at page 53 in the same case:

"It has been more than once pointed out that it is difficult, if not impossible, to lay down any general principle determinative of these questions."

But as their Lordships had earlier said it is more difficult to find the answer in cases arising out of breach of contract than in cases arising out of tort.

Thus in *McManus* v. *Bowes & Others*[2] a doctor who was employed by an authority under statutory duty as medical officer was dismissed with 3 months' notice and at the same time he was suspended from duties and given three months' salary. The doctor brought an action for wrongful dismissal. It was held

that the authority was given statutory power to dismiss him and that the dismissal was an act done "in pursuance or execution .... of any Act of Parliament."

Also in *Compton* v. *West Ham Borough Council*[3] a senior law officer appointed by the Council which they were bound to make under statutory authority, claimed for salary during the period he was absent owing to illness. It was held that, if a local authority commits any breach of a contract which, under an Act of Parliament, it is its duty to make, then it can claim the protection of the Public Authorities Protection Act.

In both of these cases the default lay on the authority in failing in their duties imposed by statutes, that is positive duties, to carry out those duties which had been laid upon them and they were thus default committed in the execution of their duties. As was clearly put by Lord Buckmaster I.C. in *Bradford Corporation* v. *Myers*[4] at page 247:

"In other words, it is not because the act out of which an action arises is within their power that a public authority enjoys the benefit of the statute. It is because the act is one which is either an act in the direct execution of a statute, or in the discharge of a public duty, or the exercise of a public authority....

It assumes that there are duties and authorities which are not public, and that in the exercise or discharge of such duties or authorities this protection does not apply."

It is to be noted in the present case that unlike the above cases, there is no suggestion that the defendant had acted in the exercise of his public duty or authority when he wrote the memorandum concerned. He might have acted in the capacity of his general duty as head of the Department where the plaintiff was serving. But there is no statute positively conferring him with this duty or authority to place the plaintiff on secondment or transfer him to the Kuching Water Board. The fact that the plaintiff had to exercise an option before his transfer could take effect would suggest that the defendant had no such duty or authority. In my view the defendant had not, in these circumstances, acted in exercise of his public duty or authority as to entitle him to the protection of the Ordinance.

Having said earlier that other reliefs sought by the plaintiff are interrelated with this action for malicious falsehood and having decided that this action is sustainable by reason that the Public Authorities Protection Ordinance does not apply, it follows that the action should be allowed to proceed to trial. Nevertheless I will deal with the question whereby this motion was made, that is, to set aside the writ as frivolous and vexatious under Order 25 rule 4 of the Rules of Supreme Court, 1957 which is as follows:

"4. The court of a judge may order any pleading to be struck out, on the ground that it discloses no reasonable cause of action or answer, and in any such case or in case of the action or defence being shown by the pleadings to be frivolous or vexatious, the court or a judge may order the action to be stayed or dismissed, or judgment to be entered accordingly, as may be just."

The plaintiff's statement of claim properly sets out the facts in support of his claim for damages arising out of the alleged malicious falsehood directed against him. He also seeks declarations of his rights to certain salary and leave consequent upon the alleged termination of his services by the defendant. These claims are supported by facts which if true would prove his claim. It would thus appear that the statement of claim raises triable issues. These issues could only be determined by proper trial of the action. On the application of this rule 4 Order 25 Lindley L.J. in Attorney General of the *Duchy of Lanscaster* v. *London and North Western Railway Co.*[5] at page 276 said:

"To what extent is the court to go on inquiring into difficult questions of fact or law in the exercise of the power which is given it under Order XXV., rule 4? It appears to me that the object of the rule is to stop cases which ought not to be launched — cases which are obviously frivolous or vexatious, or obviously unsustainable; and if it will take a long time, as is suggested, to satisfy the court by historical research or otherwise that the County Palatine has no jurisdiction, I am clearly of opinion that such a motion as this ought not to be made. There may be an application in Chambers to get rid of vexatious actions; but to apply the rule to a case like this appears to me to misapply it altogether."

A. L. Smith also in the same case said at page 278:

"I only want to make one remark about Order XXV., rule 4. It seems to me that when there is an application made to strike out a pleading, and you have to get to extrinsic evidence to show that the pleading is bad, that rule does not apply. It is only when upon the face of it it is shown that the pleading discloses no cause of action or defence, or that it is frivolous and vexatious, that the rule applies."

This principle has been accepted by the Federal Court in *Tio Chee Hing* v. *Tractors Malaysia Bhd.*[6]

For these reasons it is in my judgment that this action is not frivolous and vexatious and should be allowed to proceed to trial. In the event this motion is refused with costs.

Motion refused.

FAN YEW TENG v. SETIA USAHA, DEWAN RA'AYAT & ORS.

[O.C.J. (Mohamed Azmi J.) March 12, 1975]
[Kuala Lumpur — Originating Summons No. 68 1975]

Elections — Member of Parliament — Conviction and fine — Whether automatically render his seat vacant — Federal Constitution, arts. 44, 48(1)(e), 50(1) and 53.

The plaintiff was returned as a member of parliament for Menglembu in August 1974. On January 13, 1975 he was convicted in the High Court for an offence under the Sedition Act and was sentenced to a fine of $2,000 or six months imprisonment ([1975] 1 M.L.J.). On the same day, he appealed against the said decision and the appeal is now pending in the Federal Court. By the letter dated February 4, 1975 the first defendant informed him that on his conviction and sentence aforesaid he had become disqualified under article 48(1)(e) of the Federal Constitution and by virtue of article 50(1) his seat had become vacant. By writ of election dated February 17, 1975, the Secretary to the Election Commission directed the Returning Officer for the Parliamentary Constituency of Menglembu to proceed with the by-election of the said constituency. The required notice under the Elections (Conduct of Elections) Regulations, 1959 was published in the Utusan Malaysia newspaper on February 20, 1975. The main issue for determination in this case was whether the plaintiff's conviction and fine of $2,000 in default six months' imprisonment automatically rendered the plaintiff's seat vacant in the Dewan Ra'ayat having regard to the provision of article 53 of the Constitution.

Held: (1) the plaintiff's seat did not become vacant automatically merely because he had been convicted by the High Court and fined $2,000 and had not received a free pardon. He was entitled to exhaust his legal rights just as the House